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No. 85-462

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LEO M. MULLEN,

Petitioner,

v.

ROBERT B. SKINNER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

I. Whether the District Court correctly dismissed Petitioner's civil action under Rule 41(b) of the Federal Rules of Civil Procedure where Petitioner failed to prosecute for over four and one-half years and deliberately thwarted efforts of his attorneys and the court to develop the case for trial?

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Because Petitioner's statement of the case fails to contain all relevant facts and appropriate references to the record below, and contains misrepresentations, Respondent submits a complete statement of the relevant facts. Petitioner has made numerous references to statements made during a December 19, 1984 hearing in the District Court [*see* Petition at pp. 3, 7, 8] without including references to a prepared transcript of the hearing and without submitting a copy of

the transcript as an appendix. Additionally, Petitioner has discussed the contents of a November, 1984 telephone conversation between Petitioner's counsel, Respondent's counsel and a Federal Magistrate without providing any reference to the record or other factual support for Petitioner's counsel's version of the conversation. [Petition at p. 6]. Therefore, in the following statement of relevant facts, Respondent includes, for the Court's convenience, specific references to the Fourth Circuit record below.

On March 27, 1980, Petitioner Leo M. Mullen of Kansas City, Missouri, filed a complaint in the United States District Court for Northern District of West Virginia against Robert B. Skinner, Esquire, and Douglas S. Rockwell, Esquire, seeking compensatory and punitive damages for alleged legal malpractice. The complaint arose from the alleged failure of attorneys Skinner and Rockwell to adequately represent Petitioner in two actions filed in the Circuit Court of Jefferson County, West Virginia. On December 10, 1980, pursuant to motions by the Defendants in accordance with Rule 12(b) of the Federal Rules of Civil Procedure, the District Court dismissed the complaint with leave to amend for failure to state an adequate jurisdictional basis. The complaint was properly amended; however, the District Court dismissed with prejudice the complaint with respect to Douglas S. Rockwell, Esquire, there being no legal basis for the action. Petitioner has not challenged the dismissal of Defendant Rockwell.

On August 17, 1982, because there had been "no activity of record in connection with the development of the complaint" for over two years, the District Court entered an order, pursuant to Local Rule 2.09 and Rule 4l(b) of the Federal Rules of Civil Procedure, that Petitioner, to prevent dismissal, submit within thirty days a written statement of an intent to prosecute [Order dated 8/17/82; Transcript of

Hearing, pp. 6-7]. On September 15, 1982, Peter J. Koppe, Petitioner's attorney in Missouri, filed such notice of intent to prosecute [Notice of Intent to Prosecute Case dated 9/8/82; Transcript of Hearing, p. 7]. In March, 1983, attorney Robert H. McWilliams of Morgantown, West Virginia, filed a notice of appearance as local counsel on behalf of Petitioner. On October 19, 1984, attorney McWilliams filed a motion to withdraw as counsel for Dr. Mullen, citing, among other reasons, Petitioner's interference with the progression of the case [Motion to Withdraw dated 10/19/84]. In his affidavit, Mr. McWilliams stated that, despite advice to the contrary, Petitioner had prevented him from conducting discovery from March, 1983 through August, 1984, and had permitted only the submission of settlement offers [McWilliams Affidavit, p. 4].

On November 29, 1984, the District Court, again noting that nothing had been done in the case, ordered Petitioner to appear personally before the Court on December 19, 1984, to show cause why the action should not be dismissed for failure to prosecute [Order dated 11/14/84]. On December 19, 1984, Petitioner Mullen failed to appear personally, but was represented by attorneys Koppe and McWilliams. Attorney Koppe tendered to the Court a physician's letter regarding the medical condition of Petitioner and offered such letter as justification for Petitioner's absence [Transcript of Hearing, p. 3]. The letter stated that Petitioner was suffering from hypertension resulting from pushing a disabled automobile [Transcript of Hearing, p. 3; Letter from J. A. Nigro, M.D.]. Petitioner Mullen's pro se brief, however, states that he was not at the hearing because of a "kidney stone" [Appellant's Informal Brief, p. 2]. During the hearing, Petitioner's counsel, Robert McWilliams, stated that despite his advice to Petitioner that discovery was necessary to prepare the case for trial, Petitioner for-

bade him from doing any work other than the submission of settlement offers [Transcript of Hearing, p. 11]. Mr. McWilliams further stated that Petitioner, over several months, instructed him to wait for the Defendant to make the "first move" and to "bide their time" [Transcript of Hearing, pp. 11-14]. Mr. McWilliams mentioned that Petitioner maintained this position even after he was advised of Respondent's refusal of settlement [Transcript of Hearing, pp. 11-14]. According to McWilliams, Petitioner Mullen threatened to sue both Respondent's counsel, Herbert G. Underwood, and himself, if the case were not settled [Transcript of Hearing, p. 16].

Petitioner's counsel from Missouri, Peter J. Koppe, added that Petitioner was involved in thirty to forty law suits across the nation [Transcript of Hearing, p. 6]. Mr. Koppe concluded, "I think that the Court can see from the file that it has become significantly more difficult over the last several years to proceed with [Petitioner's] action" [Transcript of Hearing, p. 20].

Based on the record and the statements of counsel at the hearing, the District Court dismissed Petitioner's action with prejudice, concluding:

> (1) that [Petitioner's] attorneys had done everything "humanly and professionally possible" to represent [Petitioner];
>
> (2) that the prosecution of the case had been thwarted by the deliberate acts of [Petitioner]; and
>
> (3) that the primary goal of [Petitioner] appeared to be to force settlement rather than vindicate an alleged wrong.

[Transcript of Hearing, pp. 21-23]. Furthermore, the District Court granted Robert McWilliams' and Peter J. Koppe's motions to withdraw [Transcript of Hearing, p. 23].

On January 22, 1985, the District Court denied Petitioner's "Motion for Hearing on Criminal Charges Against Robert McWilliams" and "Motion for Change of Judge."

On April 9, 1985, Petitioner appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit. On May 13, 1985, the Fourth Circuit affirmed the District Court's decision, from which ruling Petitioner has filed this Petition for Writ of Certiorari.

SUMMARY 0F ARGUMENT

Under Rule 4l(b), a district court has authority to dismiss a case for failure to prosecute. The determination of what constitutes "failure to prosecute" is committed to the district court and can be disturbed only for abuse of discretion. Due to the deliberate efforts of Petitioner to coerce a settlement rather than to proceed to a disposition on the merits, there has been no development of this case since its filing almost five years ago. This failure to prosecute occurred despite the requests of Petitioner's counsel that they be allowed to prepare this matter for trial, and with knowledge of the District Court's comment that this matter not be further delayed. Such a case clearly warrants dismissal.

ARGUMENT

The Circuit Court Correctly Affirmed The District Court's Dismissal Of This Civil Action Because Petitioner Failed To Prosecute For Over Four And One-Half Years And Deliberately Thwarted Efforts Of His Attorneys And The Court To Develop The Case For Trial.

Under Rule 4l(b) of the Federal Rules of Civil Procedure, a district court unquestionably has authority to dismiss a case for want of prosecution, and may do so on its own motion. *Link v. Wabash Railroad Co.*, 370 U.S. 626 (l962). Rule 4l(b) merely codifies the inherent power of federal

courts to prevent undue delays in the disposition of pending cases, docket congestion, and the possibility of harassment of a defendant. *Id.* at 630; *Santiago v. Rivera*, 553 F.2d 710, 712 (lst Cir. 1977). The decision to dismiss for failure to prosecute is committed to the sound discretion of the district court and such decision may be disturbed only where the court has abused its discretion. *Link*, 370 U.S. at 633-34; *Davis v. Williams*, 588 F.2d 69 (4th Cir. 1978).

In determining whether a case warrants dismissal under Rule 4l(b), the district court should balance the considerations of sound judicial administration against the public policy of deciding cases on their merits. *Davis*, 588 F.2d at 70. This balancing test requires the consideration of four criteria: (l) the degree of personal responsibility on the part of the plaintiff; (2) the amount of prejudice to the defendant caused by the delay; (3) the presence or absence of a "drawn out history of deliberately proceeding in a dilatory fashion"; and (4) the effectiveness of sanctions less drastic than dismissal. *Id.* Under this test, the District Court correctly dismissed the instant civil action. This case involves deliberate dilatory conduct on the part of the Petitioner resulting in a failure to prosecute for over four and one-half years. Such conduct occurred in spite of efforts by Petitioner's attorneys to prosecute the case and after repeated court inquiries regarding whether Petitioner desired to prosecute this matter.

In *Davis v. Williams*, 588 F.2d 69 (4th Cir. 1978), a suit by a prison inmate against prison officials alleging improper medical care, the Fourth Circuit held that where a plaintiff delayed trial for nearly two years without justification, the district court did not abuse its discretion in dismissing the suit with prejudice for failure to prosecute. In affirming the district court's decision, the court noted that the plaintiff had missed several medical appointments scheduled by the

prison officials since the instigation of the suit and had otherwise failed to cooperate. *Id.* at 70. The court concluded that the obstructive conduct of the plaintiff and the long history of delay distinguished the case from those cases where the court had set aside dismissals. *Id.*

Likewise, the instant case can be distinguished from those cases where dismissals have been set aside. The facts of this case reveal a far more compelling case for dismissal than *Davis*. The complaint alleging malpractice against Respondent Robert Skinner was filed on March 27, 1980, approximately five years ago. Two and one-half years later, on August 17, 1982, because there had been "no activity of record in connection with the development of the complaint," the District Court ordered that Petitioner, to prevent dismissal, submit within thirty days a written statement of an intent to prosecute [Order dated 8/17/82; Transcript of Hearing, pp. 6-7]. On September 15, 1982, Peter J. Koppe, Petitioner's attorney in Missouri, filed such notice of intent to prosecute and requested a trial date at "the earliest convenience" [Notice of Intent to Prosecute Case dated 9/8/82; Transcript of Hearing, p. 7]. Over the next two years, however, Petitioner did nothing to prepare the case for trial and, in fact, thwarted the efforts of his attorneys to prosecute the case.

In March, 1983, attorney Robert H. McWilliams of Morgantown, West Virginia, filed a notice of appearance as local counsel on behalf of Petitioner Mullen. This appointment was intended to help Petitioner and attorney Koppe move the case towards trial [Transcript of Hearing, p. 4]. Eighteen months later, on October 19, 1984, however, attorney McWilliams filed a motion to withdraw as counsel, citing, among other reasons, Petitioner Mullen's interference with the progression of the case [Motion to Withdraw dated 10/19/84]. In his motion, Mr. McWilliams stated:

> Pursuant to the direction of the [Petitioner], counsel has not been permitted to prepare this case from June, 1983, through late August, 1984, other than to submit settlement offers. As a consequence, this case is no further prepared today than it was over 14 months ago. This action of the [Petitioner] has made it unreasonably difficult for counsel to effectively represent the [Petitioner].

[Motion to Withdraw dated 10/19/84, p. 2]. In his affidavit, Mr. McWilliams verified Petitioner Mullen's conduct, stating that Petitioner had prevented him from conducting any discovery from March, 1983 through August, 1984, and had permitted only the submission of settlement offers [McWilliams Affidavit, p. 4].

On November 29, 1984, the District Court, again noting that nothing had been done in the case, ordered Petitioner Mullen to appear personally before the court on December 19, 1984, to show cause why the action should not be dismissed for failure to prosecute [Order dated 11/29/84]. On December 19, 1984, Petitioner failed to appear personally because of medical reasons, but was represented by attorneys Koppe and McWilliams [Transcript of Hearing, pp. 1-3]. During the hearing, both attorney Koppe and attorney McWilliams attempted to convince the court that Petitioner's deliberate dilatory conduct was due to mental instability or incompetence [Transcript of Hearing, pp. 15-17, 20]. Mr. McWilliams elaborated on the conduct of Petitioner which interfered with the prosecution of the case. Mr. McWilliams stated that despite his suggestions to Petitioner that discovery was necessary before settlement, Petitioner directed him to make settlement offer to Herbert G. Underwood, counsel for Respondent [Transcript of Hearing, p. 11]. Over the next several months, Mr. McWilliams was repeatedly instructed by Petitioner to do nothing but wait

and let the Respondent make the "first move" [Transcript of Hearing, pp. 11-14]. Mr. McWilliams further stated that in letters addressed both to Respondent's counsel Underwood and to himself, Petitioner threatened to sue if the case were not settled [Transcript of Hearing, p. 16]. Mr. McWilliams further stated that during a telephone conversation in which he informed Petitioner of his motion to withdraw as counsel, Petitioner responded, "I don't want anymore of your lip. Get it settled! Or I will sue you and Mr. Underwood" [Transcript of Hearing, p. 16].

Mr. Koppe's statements at the hearing also confirmed the deliberate dilatory conduct of Petitioner Mullen as well as Petitioner's eccentric and litigious nature. Mr. Koppe mentioned to the court that the Missouri Court of Appeals listed some thirty or forty cases involving Petitioner as party, or witness [Transcript of Hearing, p. 6]. Mr. Koppe also stated that in spite of the understanding that he was to aid Mr. McWilliams in case preparation, Petitioner removed him from the case when Mr. McWilliams was hired [Transcript of Hearing, pp. 4-5, 8-10]. Upon Mr. McWilliams' motion to withdraw, however, Petitioner again consulted Mr. Koppe [Transcript of Hearing, p. 5]. Mr. Koppe advised Petitioner that additional work was needed to prepare the case for trial [Transcript of Hearing, p. 5]. Petitioner then "fired" Mr. Koppe as his attorney in the case until Mr. Koppe was "hired" to attend the hearing of December 19, 1984 [Transcript of Hearing, pp. 3, 5]. Finally, Mr. Koppe concluded, "I think the Court can see from the file that it has become significantly more difficult over the last several years to proceed with [Petitioner's] action" [Transcript of Hearing, p. 20].

Thus, based on the case record and the hearing of December 19, 1984, the District Court dismissed the case with prejudice, concluding:

> [T]hat each of [Petitioner's] counsel have been thwarted by various and sundry actions of the [Petitioner] and have not been able to proceed with the development and the prosecution of this case.
>
> And that result has been the direct result of [Petitioner's] activities; the [Petitioner's] attempts to prevent the case from coming to trial. . . . [I]t would seem . . . that it was the [Petitioner's] primary goal to achieve some type of settlement of the case rather than to vindicate some alleged wrong . . . .

[Transcript of Hearing, p. 22]. Such actions by Petitioner Mullen are precisely the sort of behavior which Rule 41(b) is designed to prevent. The delay of over four and one-half years, the deliberately obstructive conduct of Petitioner and the failure of Petitioner to respond to the court's repeated efforts to "prod" the case toward trial make dismissal with prejudice the only appropriate sanction. Petitioner cannot now attack the District Court for failing to "prod" Petitioner more vigorously or Respondent for failing to conduct discovery. [Petition at p. 10]. The duty to prosecute rested with the Petitioner who intentionally failed to meet that duty.

CONCLUSION

For the foregoing reasons, Respondent Robert B. Skinner respectfully requests that Leo Mullen's Petition for Writ of Certiorari to this Honorable Court be denied.

Respectfully submitted,

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